IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC09-536

ANTHONY KOVALESKI,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

PAMELA JO BONDI
Attorney General
Tallahassee, Florida

CELIA TERENZIO
Assistant Attorney General
Florida Bar Number 0656879

KATHERINE Y. MCINTIRE
Assistant Attorney General
Florida Bar No. 0521159
1515 North Flagler Drive
Suite 900
West Palm Beach, Florida 33401
Telephone: (561) 837-5000
Counsel for Respondent

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PRELIMINARY STATEMENT

Petitioner was the defendant and Respondent was the prosecution in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, in and for Indian River County, Florida. Petitioner was the Appellee and Respondent was the Appellant in the Fourth District Court of Appeal ("Fourth District"). In this brief, the parties shall be referred to as they appear before this Honorable Court except that Respondent may also be referred to as the State.

STATEMENT OF THE CASE

The State accepts Petitioner's Statement of the Case for purposes of this petition only to the extent that they are relevant, non-argumentative, set forth verbatim the record of the proceedings with record citations, and subject to the additions and clarifications below:

On appeal, the Fourth District Court affirmed Petitioner's convictions and sentences. In its opinion, the Fourth District rejected Petitioner's position that the trial court committed error by not allowing him to pose the following question to the victim: "Did you ever make an accusation about someone else having sex with you?". Kovaleski v. State, 1 So.3d 254, 256 (Fla. 4th DCA 2009). The Fourth District determined that the issue had not been properly preserved through proffer "because the record is silent as to whether the minor had ever made such an accusation or withdrawn it". Id. Moreover, the Fourth expressed doubt as to whether such evidence would even be admissible. Id.

The Fourth District Court also rejected Petitioner's contention that the trial court erred in failing to conduct an analysis pursuant to Waller v. Georgia, 467 U.S. 39 (1984) prior to granting the State's request for partial closure under §918.16(2), Florida Statutes (2006). As a preliminary matter, the Fourth District determined that Petitioner waived his right

to public trial by failing to launch an adequate objection. Kovaleski, 1 So.3d at 258. Notwithstanding, the Fourth District agreed with Clements v. State, 742 So.2d 338 (Fla. 5th DCA 1999) that Waller is inapplicable to partial courtroom closures under §918.16(2), Florida Statutes and affirmed as to the closure.

STATEMENT OF THE FACTS

The State accepts Petitioner's Statement of the Facts for purposes of this petition only to the extent that they are relevant, non-argumentative, set forth verbatim the record of the proceedings with record citations, and subject to the additions and clarifications below:

In his defense, Petitioner called witness Maritza Anderson (T Vol. 5, 927). Anderson testified that victim J.L. told her that he did not have sex with Petitioner; he had sex with Missy Kovaleski (T Vol. 5, 927).

Victim J.L. was recalled as a rebuttal witness after the close of Petitioner's case (T Vol. 5, 955). J.L. testified that he knew Maritza Anderson – they were friends when he was about fourteen (T Vol. 5, 955). He did not discuss personal matters with her (T Vol. 5, 956). He never discussed with her that Petitioner was present in the bedroom when he (J.L.) was having sex with Missy Kovaleski (T Vol. 5, 956).

Counsel for Petitioner questioned J.L. during rebuttal

cross-examination: "Did you ever make an accusation about someone else having sex with you and later withdraw it?" (T Vol. 5, 956). The State objected that the question was beyond the scope of the rebuttal direct examination (T Vol. 5, 957). The trial court sustained the objection on the State's basis as well as "improper impeachment and/or irrelevant and/or extrinsic evidence of a collateral matter." (T Vol. 5, 957).

SUMMARY OF THE ARGUMENT

The trial court did not err in applying a partial closure of the courtroom in compliance with §918.16(2), Florida Statutes during the victim's testimony without conducting a Waller analysis. Waller concerns are addressed within the language of the statute, thus making a separate analysis unnecessary. Notwithstanding the propriety of the partial closure, Petitioner waived his right to a public trial by failing to launch an adequate objection to the procedure.

The Fourth District properly determined that a proffer was necessary to properly preserve Petitioner's challenge to the exclusion of evidence. The relevance of the evidence was not apparent by the context within which it was offered. Moreover, the specific testimony could not be inferred where the record was silent on the issue. The Fourth District could not infer that the answer was favorable to Petitioner simply because it was asked in a leading fashion.

ARGUMENT

POINT I

THE TRIAL COURT'S PARTIAL CLOSURE OF THE COURTROOM DURING THE VICTIM'S TESTIMONY AT TRIAL PURSUANT TO §918.16(2), FLORIDA STATUTES (2006) DID NOT RUN AFOUL OF WALLER V. GEORGIA, 467 U.S. 39 (1984)(RESTATED)

At Petitioner's trial on one count of Committing a Lewd, Lascivious, or Indecent Act Upon a Child under Sixteen Years of Age and one count of Committing a Lewd, Lascivious, or Indecent Act In the Presence of a Child, the State, after consulting with the victim, requested a courtroom closure pursuant to §918.16(2), Florida Statutes (2006) during his testimony (T Vol. 4, 659-660, 701). Petitioner objected "for the record" (T Vol. 4, 701). Assistant State Attorney Adam Chrzan was asked to leave (T Vol. 4, 724). Nothing was said to Adam Neil, reporter from the Press Journal, once the trial court verified with counsel for Petitioner that he was with the press (T Vol. 4, 724).

On appeal, Petitioner alleged that the trial court violated his Sixth Amendment right to a public trial where it ordered partial closure of the courtroom pursuant to §918.16(2), Florida Statutes (2006) without first engaging in the four-part analysis pronounced in Waller v. Georgia, 467 U.S. 39 (1984). The Fourth District Court of Appeal rejected Petitioner's position. In its decision the Fourth District preliminarily indicated that

Petitioner's failure to launch an adequate objection waived his right to public trial. Notwithstanding, the Fourth District cited Clements v. State, 742 So.2d 338 (Fla. 5th DCA 1999) and agreed with its determination that Waller is inapplicable to partial closures under §918.16, Florida Statutes (2006).

Here, Petitioner continues to contend that, contrary to the lower court's decision, the trial court's closure pursuant to §918.16(2), Florida Statutes (2006) violated his Sixth Amendment right to public trial. Petitioner argues that in Alonso v. State, 821 So.2d 423 (Fla. 3d DCA 2002) the Third District correctly decided that in order to justify any closure, the court must find "that a denial of such right is necessitated by a compelling state interest and is narrowly tailored to serve that interest" by conducting a Waller analysis. Alonso, 821 So.2d at 426. Petitioner's position is unavailing, however, where the language of §918.16(2), Florida Statutes (2006) clearly addresses the Waller prerequisites to closure making a separate analysis unnecessary.

THE RIGHT TO PUBLIC TRIAL

The Sixth Amendment right to a public trial is one of the most basic and fundamental tenets of our judicial system. The Sixth Amendment right to a public trial "'has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution'". Gannett Co. v. DePasquale, 443 U.S. 368, 380, 99 S.Ct. 2898, 61 L.Ed.2d 608

(1979) (quoting In re Oliver, 333 U.S. 257, 270, 68 S.Ct. 499, 92 L.Ed. 682 (1948)). "'The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on the possible abuse of judicial power.'" Id. The Sixth Amendment guarantee of a public criminal trial "'is for the protection of all persons accused of crime-the innocently accused, that they may not become the victim of an unjust prosecution, as well as the guilty, that they may be awarded a fair trial....'". Id. (quoting Oliver, 333 U.S. at 270 & n. 25, 68 S.Ct. 499).

WALLER V. GEORGIA'S ANALYSIS PRIOR TO CLOSURE TO ENSURE THE RIGHT TO PUBLIC TRIAL IS PROTECTED

Although the right of access to criminal trials is of utmost constitutional importance, it is not absolute. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982). Although limited, there are circumstances wherein closure is allowed. Id. Indeed, the right to an open trial may give way in certain cases to other rights or interests. Waller, 467 U.S. at 45. As explained by the United States Supreme Court, although the presumption of openness may be overcome, it can only be overcome by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501, 510, 104 S.Ct. 819,

824, 78 L.Ed.2d 629 (1984).

The test to determine whether the presumption of openness has been rebutted is now well known as a Waller inquiry. In Waller v. Georgia, 467 U.S. 39 (1984) a trial court in Georgia ordered that the suppression hearing in Waller's racketeering case be closed to the public, over defense's objection, based on the State's concerns about disclosing sensitive wiretap evidence. The suppression hearing was closed to all persons other than witnesses, court personnel, the parties and the lawyers. Waller, 467 U.S. at 42. In its opinion, the Waller court explained that although a presumption of openness can be overcome, it can only be overcome "based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest". Waller, 467 U.S. at 45. In order to determine whether this presumption has been overcome, the Waller court enunciated a four part test that must be met before any closure takes place "over the objections of the accused". Waller, 467 U.S. at 47. The four part test dictated:

> the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.
>
> Waller, 467 U.S. at 48.

Finding that the trial court failed to meet the pre-requisites for closure under their four part test, the United States Supreme Court reversed.

CLOSURE UNDER SECTION 918.16(2), FLORIDA STATUTES

The prosecution of sex crimes differs from the prosecution of other crimes, such as Waller's crime of racketeering, in one significant respect. The State, in prosecuting a sex crime, will always have one overriding interest in common: protecting the victim's privacy. Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 9 n. 2, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986) ("Press-Enterprise II") (noting Globe's recognition that "[t]he protection of victims of sex crimes from the trauma and embarrassment of public scrutiny may justify closing certain aspects of a criminal proceeding"). Seemingly recognizing that the prosecution of sex crimes will by its nature necessitate a sensitive victim who may desire privacy, the Legislature legislated the closure to be allowed during his/his testimony. The language of this legislation, §918.16(2), Florida Statutes, in effect streamlines the analysis provided by Waller by dictating a closure that considers Waller type concerns and addresses them accordingly.

Section 918.16(2) reads as follows:

> [w]hen the victim of a sex offense is testifying concerning that offense in any civil or criminal trial, the court shall clear the courtroom of all persons upon the

> request of the victim, regardless of the victim's age or mental capacity, except the parties to the cause and their immediate families or guardians, attorneys, and their secretaries, officers of the court, jurors, newspaper reporters or broadcasters, court reporters, and, at the request of the victim, victim or witness advocates designated by the state attorney may remain in the courtroom.

To begin, a closure under §918.16(2), Florida Statutes cannot be initiated as matter of course but must initiated by the victim's request. In requesting the privacy afforded by §918.16(2), Florida Statutes, the victim has expressed a need to be protected from the trauma and embarrassment of public scrutiny. The State has an overriding interest in providing the victim with this protection. Thus, the first element of Waller is met.

The language of section 918.16(2), Florida Statutes also ensures that the closure is no broader than necessary to protect the State's/victim's interest in compliance with Waller. In Waller, although the State's expressed interest in closure was the sensitivity of wiretap evidence that would be played at the suppression hearing, the wiretap evidence only made up 2 ½ hours of the seven day hearing. Waller, 467 U.S. at 49. Notwithstanding, the courtroom was closed the entire seven days. Id. Such an extended closure was deemed "far more extensive than necessary". Waller, 467 U.S. at 49.

Section 918.16(2), Florida Statutes automatically limits the breadth of a closure allowed under its application. Pursuant to

the statute, the courtroom will **only** be closed when the victim testifies in court. In other words, the victim will be afforded privacy when he/she personally recounts the sexual crime committed against him/her. There is no provision for closure during other witnesses' testimony recounting the same violation such as testimony from detectives, doctors, or eyewitnesses, if any. Accordingly, the second element of Waller is also met.

The language of §918.16(2), Florida Statutes also ensures that the third element of Waller is addressed. Specifically, section 918.16(2), Florida Statutes, provides for reasonable alternatives to completely closing a proceeding to the public - the alternative being the exhaustive list of parties that are allowed to remain despite the victim's request for closure. This list includes not only parties to the cause and essential courtroom staff, but members of the general public as well. Members of the general public allowed to remain are spectators in the form of the parties' immediate families or guardians, attorneys' secretaries, newspaper reporters or broadcasters, and, at the request of the victim, victim or witness advocates. The only people temporarily affected by the limited closure under this statute: idly curious spectators with no direct interest in the case.

Finally, there is no need for a trial court to make separate findings, as instructed by Waller's last element, as long as the

closure is applied pursuant to §918.16(2), Florida Statutes. Compliance with the statute would necessarily yield to a finding that Waller's pre-requisites have been addressed prior to closure. A trial court's act of memorializing such a finding would be useless ceremony and wholly unnecessary.

IN LIGHT OF §918.16(2)'S LANGUAGE, CLEMENTS V. STATE WAS CORRECTLY DECIDED

The Fifth District recognized the unique language of §918.16(2), Florida Statutes and addressed its significance in Clements v. State, 742 So.2d 338 (Fla. 5th DCA 1999) *review dismissed* 782 So.2d 868 (Fla. 2001). In Clements, the appellant faced charges of sexual battery on a child under 12 and three counts of lewd acts upon a child. On appeal, Clements challenged the trial court's act of clearing the courtroom during his victim's testimony pursuant to §918.16(1)[1], Florida Statutes. Clements argued that his case was controlled by Pritchett v. State, 566 So.2d 6 (Fla. 2d DCA), *review dismissed*, 570 So.2d 1306 (Fla. 1990) and Thornton v. State, 585 So.2d 1189 (Fla. 2d DCA 1991). Clements, 742 So.2d at 340.

At the outset, the Clements court distinguished Pritchett

[1] Section 918.16(1), Florida Statutes (1987) provided: In the trial of any case, civil or criminal, when any person under the age of 16 is testifying concerning any sex offense, the court shall clear the courtroom of all persons except parties to the cause and their immediate families or guardians, attorneys and their secretaries, officers of the court, jurors, newspaper reporters or broadcasters, and court reporters.

and Thornton based upon the fact that in those cases, the trial courts cleared the courtroom of all spectators, without any exceptions authorized under the statute. Id. This distinction, however, did not end the analysis. Id. The Clements court would also have to determine whether the partial closure, absent an independent Waller inquiry, violated Clements' right to a public trial. Id.

The Clements court determined that a separate Waller inquiry is not required when a partial closure is ordered under §918.16(1), Florida Statutes. In support of this determination, the Clements court explained:

> [t]he Legislature, by enacting section 918.16, has found that there is a compelling state interest in protecting younger children or any person with mental retardation while testifying concerning a sexual offense. Accordingly, section 918.16 is narrowly drawn to ensure that a defendant's right to an open trial is protected. It requires partial closure only during the limited time in which a child under sixteen years of age or a mentally retarded person is to testify about a sex offense. The spectators who are temporarily excluded from the proceeding are only those with no direct interest in the case. The press, as the eyes and ears of the public, is allowed to remain. As the public's proxy, the presence of the press preserves a defendant's constitutional right to a public trial. Per section 918.16, Florida Statutes, which, we note, Clements has not challenged as unconstitutional, the idly curious were properly ordered from the courtroom.
>
> Clements, 742 So.2d at 341.

In sum, the Clements court determined that the language of

§918.16(1), Florida Statutes was narrowly drawn in a manner where it complied with Waller concerns. Accordingly, a separate Waller inquiry was not necessary ***as long as the closure was sought under, and complied with the language of, §918.16(1), Florida Statutes***.

ALONSO V. STATE AND PRITCHETT V. STATE MUST BE DISAPPROVED

Despite the sound reasoning of Clements, Petitioner implores this Court to approve the decisions by the Third District in Alonso v. State, 821 So.2d 423 (Fla. 3d DCA 2002) and Second District in Pritchett v. State, 566 So.2d 6 (Fla. 2d DCA 1990). In those cases, the district courts determined that regardless whether a closure is total or partial, the trial court must find that the closure is necessitated by a compelling government interest and is narrowly tailored to serve that interest through a Waller inquiry.

Inasmuch as the general proposition is concerned, Respondent does not necessarily disagree. Indeed, it seems clear that if a trial court imposes a closure, total or partial, under any situation ***other than what is specified in §918.16, Florida Statutes***, a trial court ***must*** apply the Waller analysis to weigh the interest raised and tailor the closure warranted.

Petitioner cannot disagree with this statement given his acknowledgement and acceptance of a §918.16, Florida Statutes

closure during the victim's testimony at his first trial. Kovaleski v. State, 854 So.2d 282 (Fla. 4th DCA 2003). Only when it became evident during the victim's testimony that he had turned 16 (and was no longer eligible for protection under §918.16, Florida Statutes) did Petitioner object to a ***continued closure*** of the proceeding without a Waller inquiry. Kovaleski, 854 So.2d at 282-284. The ***continued closure*** of the victim's testimony without the benefit of a Waller inquiry was deemed reversible error. Id. Thus, at the very least during his first trial, Petitioner agreed that closures under §918.16, Florida Statutes were appropriate as long as the statute was applicable.

Notwithstanding his prior approval of a §918.16, Florida Statutes closure, Petitioner cannot gain relief based on the erroneous positions of Alonso and Pritchett. The error in Alonso and Pritchett stems from their refusal to steer from the general proposition of Waller that any closure of a courtroom necessitates a Waller analysis without regard for the language of §918.16 and its application. This refusal ignores the backdrop of the statute's purpose.

Specifically, Alonso and Pritchett's reasoning ignores the inherent difference between prosecuting sex crimes and other crimes. In sex cases, unlike other prosecutions, the State will always have the same interest: a victim whose privacy interest may need to be protected. The defendant, on the other hand, will

also have one interest in common: the right to a public trial. Thus, one remedy was created to address these competing interests. The legislature, in enacting §918.16, Florida Statutes, carefully crafted the briefest and most limited type of closure in order to protect the accused's right to public trial while affording the victim privacy, if warranted. The language in §918.16, Florida Statutes does not preclude or override Waller's concerns, but embraces and addresses them. The language and application, in and of itself, passes Waller muster. Accordingly, a separate Waller analysis is unnecessary.

In further efforts to persuade this Court to adopt Alonso and Pritchett's decision, Petitioner relies on language from the United States Supreme Court's decision in Globe Newspaper and the Alaska Supreme Court in Renkel v. State, 807 P.2d 1087, 1092 (Alaska 1991) suggesting that statutes like §918.16(2), Florida Statutes are unconstitutional. Preliminarily, Respondent reminds this Court that Petitioner is not challenging the constitutionality of §918.16(2), Florida Statutes. That being said, such reliance is misplaced where the statutes featured in Globe Newspaper and Renkel called for a complete closure of proceedings from all public ***including*** press. Section 918.16(2), Florida Statutes calls for no such closure.

Respondent acknowledges Globe's warning that "…a mandatory rule, requiring no particularized determination in individual

cases, is unconstitutional." Globe Newspaper, 457 U.S. at 611, n.27. Again, it is Respondent's position that §918.16, Florida Statutes does not deprive Petitioner from an analysis prior to closure but frames the analysis in its language and application.

Finally, Petitioner claims that Clements "is in error in applying a different standard to cases of partial rather than total closure of a trial". Initial Brief on Merits, 17. Petitioner acknowledges that a plethora of caselaw from our State and throughout the nation specifically hold that a partial closure only calls for a "substantial" rather than "compelling" reason for closure. Initial Brief on Merits, 17. Notwithstanding, Petitioner disagrees with this well settled proposition by relying on Presley v. Georgia, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010). According to Petitioner, the Presley court "did not appear to consider that there was any distinction between total and partial closures for purposes of constitutional analysis." Initial Brief on Merits, 17. Thus, in his view, there is no distinction. Petitioner's interpretation of Presley is wholly unsupported.

In Presley, at issue was whether the Sixth Amendment right extended to jury selection and whether a court must, sua sponte, advance its own alternatives to closure. Id. There was no discussion of partial versus total closure[2]. Id. Indeed, the

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2 One can argue that the closure was total being that the claim

Court did not even address whether the State court had an "overriding interest" in closure finding that regardless of the state's court's reasons, it was still incumbent upon it to consider all reasonable alternatives to closure. Presley, 130 S.Ct. at 725. Presley clearly does not stand for the proposition that a partial closure is subject to the same standards of a total closure. Petitioner's attempt to draw such a proposition from the Presley opinion is unpersuasive.

ERROR, IF ANY, HAS BEEN WAIVED

Assuming arguendo that there was any error in the trial court's application of §918.16, Florida Statutes, Respondent respectfully submits that Petitioner waived his right to public trial prior to the closure. Petitioner correctly points out that "[t]he violation of the constitutional right to public trial is a structural error, not subject to the harmless error analysis." Initial Brief on Merits, 10 (citing Neder v. United States, 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)). It is a right, however, that is subject to waiver. Levine v. United States, 362 U.S. 610, 619, 80 S.Ct. 1038, 1044, 4 L.Ed.2d 989 (1960). The failure to object to the closing of courtroom is considered a waiver of the right to public trial. Id.; Evans v. State, 808 So.2d 92 (Fla. 2001).

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revolved around one "lone courtroom observer", later determined to be Presley's uncle, being asked to leave the courtroom to make space for the jury. Presley, 130 S.Ct. at 722.

In order to properly preserve an issue for appellate, an objection must be specific enough to apprise the trial judge of a putative error and give the trial court the opportunity to address the complaint. See e.g. Williams v. State, 414 So.2d 509, 511 (Fla. 1982); Luda v. State, 860 So.2d 457, 458 FN1 (Fla. 4th DCA 2003). General objections are insufficient. Ferguson v. State, 417 So.2d 639 (Fla. 1982)(objections must be made with sufficient specificity to apprise the trial court of the potential error and to preserve the point for appellate review; a general objection is insufficient). To be sure, an objection "for the record," without setting forth legal grounds, is inadequate to preserve an issue for appeal. Mansingh v. State, --- So.3d ----, 2011 WL 3754605 (Fla. 5th DCA August 26, 2011)(determining that a general objection for the record was inadequate to properly preserve his right to public trial issue raised on appeal where, although counsel objected for the record, he did not make argument or alert the trial court of Waller v. Georgia issues.).

At bar, when the State sought to have §918.16(2), Florida Statutes invoked, Petitioner's only response was, "---for the record, we object, Your Honor." (T Vol. 4, 701). Petitioner made no effort to argue his objection, cite Waller concerns, or at the very least, place on the record whether there were any people being asked to leave that he wanted to stay. Accordingly, as

properly observed by the Fourth District, below, Petitioner waived his right to public trial by failing to sufficiently preserve the issue for review.

THE FOURTH DISTRICT'S OPINION BELOW AND CLEMENTS MUST BE AFFIRMED

The Fourth District below, the Fifth District in Clements and the First District in Hobbs v. State, 820 So.2d 347 (Fla. 1st DCA) have correctly determined that a separate Waller inquiry is not required when the trial court follows section 918.16 to achieve a partial closing. Section 918.16(2), Florida Statutes's language clearly balances the two interests involved in prosecuting a sex crime: the State's interest in protecting the victim of such a humiliating crime from further embarrassment and a defendant's Sixth Amendment interest. The application of the statute does nothing to abridge the defendant's right to a public trial. Instead, its language goes to great lengths to ensure that his constitutional right is scrupulously honored by considering Waller type concerns and providing for a closure that satisfies these concerns. Indeed, the statute provides for a closure that allows the victim's delicate testimony to proceed, not in secret, but under the watchful eyes of a defendant's family, his attorneys, his attorney's assistants and the media. Respondent would venture to say these members of the public, specifically, would act "to safeguard against any attempt to

employ our courts as instruments of persecution". In Re Oliver, 333 U.S. 257, 270, 68 S.Ct. 499, 92 L.Ed. 682 (1948). Accordingly, the lower court's decision below and that of the Fifth District's in Clements must be approved.

POINT II

THE FOURTH DISTRICT COURT OF APPEAL CORRECTLY DETERMINED THAT A PROFFER WAS NECESSARY UNDER THE FACTS OF THIS CASE TO PROPERLY PRESERVE PETITIONER'S CHALLENGE TO THE EXCLUSION OF TESTIMONY. THE SUBSTANCE OF THE EXCLUDED TESTIMONY WAS NOT APPARENT FROM THE CONTEXT WITHIN WHICH IT WAS OFFERED (RESTATED)

In his defense, Petitioner called witness Maritza Anderson (T Vol. 5, 927). Anderson testified that victim J.L. told her that he did not have sex with Petitioner; he had sex with Missy Kovaleski (T Vol. 5, 927). Victim J.L. was recalled as a rebuttal witness after the close of Petitioner's case (T Vol. 5, 955). J.L. testified that he knew Maritza Anderson – they were friends when he was about fourteen (T Vol. 5, 955). He did not discuss personal matters with her (T Vol. 5, 956).

During rebuttal cross-examination, Petitioner questioned without preface or provocation: "Did you ever make an accusation about someone else having sex with you and later withdraw it?" (T Vol. 5, 956). The State objected that the question was beyond the scope of the rebuttal direct examination (T Vol. 5, 957).

The trial court sustained the objection on the State's basis as well as "improper impeachment and/or irrelevant and/or extrinsic evidence of a collateral matter." (T Vol. 5, 957).

Petitioner concedes that under Pantoja v. State, 59 S.3d 1092 (Fla. 2011) "it appears that the trial court correctly excluded the cross examination about J.L.'s withdrawn report of sexual abuse on the merits". Initial Brief on Merits, 24. Notwithstanding, Petitioner argues that the portion of the Fourth District's decision on preservation should be reversed. According to Petitioner, the Fourth District's decision is in conflict with the holdings in Reaves v. State, 531 So.2d 401 (Fla. 5th DCA 1988), O'Shea v. O'Shea, 585 So.2d 405 (Fla. 1st DCA 1991), Pacifico v. State, 642 So.2d 1178 (Fla. 3d DCA 1989), and G.A. v. State, 549 So.2d 1203 (Fla. 3d DCA 1989) that a proffer is unnecessary where the substance of the excluded testimony is apparent from the context within which it was offered. Petitioner's position is wholly without merit.

Respondent agrees, as did the Fourth District below, that a proffer is unnecessary where the substance of the excluded testimony is apparent from the context within which it was offered. Reaves; Kovaleski, 1 So.3d at 256. In Reaves, the trial court allowed the state to reopen its case after resting in order to call an additional rebuttal witness, one Charles Cannon, to rebut co-

defendant Soto's defense of entrapment[3]. Reaves, 531 So.2d at 402-403. Cannon testified that Soto was involved in a prior drug transaction, testimony which was admissible as tending to show predisposition and thereby disproving entrapment. Id. After Cannon's testimony, Soto's trial counsel requested the opportunity to present surrebuttal evidence. This was denied by the trial court. Id.

On appeal, Soto argued that the trial court erred in refusing to allow surrebuttal evidence. Id. The State countered that Soto had failed to preserve the issue by proffering the evidence that would have been elicited. Id. The Fifth District disagreed with the State's argument on preservation reasoning that the defendant's "precluded surrebuttal testimony would have been necessarily limited to refuting the state's evidence tending to prove predisposition on the issue of entrapment." Reaves, 531 So.2d at 403. Thus, the court was not required to speculate as to the substance of the surrebuttal testimony where it was obvious by its context. Id.

The First District in O'Shea also rejected the State's lack of preservation without proffer argument under the facts of that case. O'Shea, 585 So.2d at 407-408. There, the issue at hand was whether the former wife's new boyfriend, Archer, could provide a proper

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3 This case is a consolidated appeal of William Reaves and Ruben A. Soto convictions for trafficking in cocaine and possession of a firearm in the commission of a felony.

environment for the child. Id. The former wife, however, objected to the husband's questioning of Archer's ex-wife as to his relationship with his own child. Id. The objection was sustained the propriety of which was raised on appeal. Id.

The First District opined that testimony describing Archer's relationship with his own child was very relevant to the issue - thus, the response should have been admitted. Id. Proffer was unnecessary where the substance of the response was obvious – it was going to be a description of his relationship with his son. Id.

The Third District's decision G.A. also highlights circumstances wherein a proffer is unnecessary. In G.A., G.A. was charged with Battery on a Law Enforcement Officer. The State's sole witness, the officer, testified that while he was investigating a complaint about stolen bicycles at a house in Miami, G.A. pushed him and used threatening words and actions. G.A., 549 So.2d at 1203-1204. In his defense, G.A. testified that he found strangers at his grandmother's house that he did not know were police officers. Id. The officer grabbed him by the throat and when the mother came to separate them, the officer then pushed his mother. Id.

G.A. sought to have his mother testify but the trial court refused citing the fact that the mother had been present in the courtroom during G.A.'s testimony. Id. The Third District found

this exclusion to be improper. Id. Rejecting the State's preservation argument, the Third District observed that G.A. tried to proffer the testimony but was cut off by the court. Id. Notwithstanding, it was clear that the mother's testimony would have been relevant to the issue: "allegedly having been a witness to and involved in the latter part of the altercation between the juvenile and the officer, [the mother] could have testified as to whether the juvenile or the officer was the aggressor, and also could have corroborated either the juvenile's or the officer's testimony." Id.

Here, neither Reaves, O'Shea, nor G.A. mandate reversal of the Fourth's decision that a proffer was necessary to preserve Petitioner's evidentiary issue. To begin, the relevance of J.L.'s testimony could not be inferred from the context within which it was offered. The question was posed during rebuttal cross-examination of the State's rebuttal witness on a subject completely outside the context of the rebuttal purpose.

Nor is there any merit to Petitioner's argument that "the nature of the evidence [he] sought to include was even more readily apparent from the leading question posed…" where "[t]he answer to this question could only have been yes". Initial Brief on Merits, 26. Apparently Petitioner believes that when a question is framed in a leading fashion, a reviewing court should speculate that the answer was favorable to him. Applying his reasoning to the

question posed here, the reviewing court should have inferred that J.L. previously made an accusation about someone else having sex with him (and later withdrew it), as well as inferred that the accusation was one of sexual misconduct and not just some story of sexual conquest. There was absolutely no record evidence before the Fourth District to support such inferences. A proffer of the excluded testimony was necessary for preservation.

Petitioner's argument on this point is simply disagreement with the Fourth District's decision on the matter. Disagreement with the Fourth District's decision, however, is not a basis for reversal. Gibson v. Maloney, 231 So.2d 823 (Fla. 1970)("It is conflict of decisions, not conflict of opinions or reasons that supplies jurisdiction for review by certiorari"). Accordingly, the Fourth District's decision below must be affirmed.

CONCLUSION

Based on the foregoing, the State respectfully requests that the decision of the District Court of Appeal in Kovaleski v. State, 1 So.3d 254 (Fla. 4th DCA 2009) and Clements v. State, 742 So.2d 338 (Fla. 5th DCA 1999) be approved.

Respectfully submitted,

PAMELA JO BONDI
Attorney General
Tallahassee, Florida

____
CELIA TERENZIO
Bureau Chief
Assistant Attorney General
Florida Bar No. 0656879

____
KATHERINE Y. MCINTIRE
Assistant Attorney General
Florida Bar No. 0521159
1515 North Flagler Drive
Suite 900
West Palm Beach, FL 33401
(561) 837-5000
Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Respondent's Brief on the Merits" has been furnished to: Tatjana Ostapoff, Office of the Public Defender, 421 Third Street, 6th Floor, West Palm Beach, FL 33401 by U.S. Mail and Email on October 13, 2011.

KATHERINE Y. MCINTIRE

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with Fla. R.App. P. 9.210, the undersigned hereby certifies that the instant brief has been prepared with 12 point Courier New Type.

KATHERINE Y. MCINTIRE